



COMPENSATION PRACTICE AND QUALITY DEPARTMENT

PRACTICE DIRECTIVE # C12-7

TOPIC: Surveillance and Other Evidence

ISSUE DATE: May 2, 2007, Amended March 16, 2011 and March 24, 2016

Objective

This practice directive is intended to provide guidance to WorkSafeBC officers in determining whether it is appropriate to request surveillance on a worker and the treatment of surveillance evidence. As well, section G of this practice directive provides guidance to officers on the handling and treatment of non-print (e.g., video or physical) evidence provided by parties external to WorkSafeBC.

Law & Policy

Under section 96 of the *Workers Compensation Act* (the "Act"), WorkSafeBC is given the authority to both investigate and adjudicate claims for compensation. In performing these functions, WorkSafeBC operates on an inquiry basis which means that it is responsible for continuing to inquire until there is enough evidence to make a decision. It is the WorkSafeBC officer's job to gather and receive evidence to make those decisions.

WorkSafeBC policy requires that the evidence used to make a decision be sufficiently complete and reliable to reach a sound conclusion with confidence (see Policy item #97.00, *Evidence*, in the *Rehabilitation Services and Claims Manual*, Vol. II ("RSCM")). If the evidence is not sufficiently complete and reliable, the officer considers what other evidence might be obtained, and takes the initiative in seeking further evidence. Once the available evidence has been obtained, the officer determines the weight given to the evidence to make a finding of fact. The weight of the evidence is a reflection of the strength of the logical connection between the information and the fact to be decided. Some information provides compelling evidence of resulting fact while other information may only marginally support the existence of a fact. Once the officer has decided on a set of facts, the officer considers those facts against the appropriate policy to arrive at an adjudicative decision.

Adjudicative and Administrative Guidelines

The purpose of surveillance is to determine if the worker's presentation in an uncontrolled environment is consistent with his/her presentation in a controlled environment (e.g., an examination by a WorkSafeBC Medical Advisor).

Surveillance is a tool of last resort to be used where there are reasonable grounds to suspect misrepresentation or fraud by a worker and other investigative methods would be ineffective. For example, when conflicting information is identified, such as medical evidence not supporting the worker's subjective complaints, misrepresentation or fraud are always a possible explanation, and in itself provides reasonable grounds to conduct surveillance. There does not need to be an identified fraudulent act before surveillance can be authorized. Rather, where grounds exist, surveillance is used as a last resort to determine if fraud or misrepresentation is occurring by independently verifying a worker's stated limitations and capabilities.

(A) Requesting Surveillance

The following types of claims are not subject to surveillance except when there is evidence of fraud:

- claims where the worker is not receiving disability benefits;
- claims where the worker has not requested benefits.

Where benefits are being paid or requested on a claim, the following factors are considered before making or approving a request for surveillance:

- whether there is inconsistent presentation by the worker relative to what would be expected for the injury;
- whether the worker's previous claims history/previous investigations indicate prior misrepresentation or violations;
- whether there are suspicious claim circumstances (i.e., difficult to contact, background noise on phone indicates working, conflicting information, etc.);
- whether there is credible information from the TIPS line or other sources suggesting misrepresentation or fraud; and
- whether there is evidence of risk of self-harm or psychological conditions that may be exacerbated by WorkSafeBC conducting surveillance.

When considering these factors, speculation alone is not enough to initiate a referral.

The potential impact on a worker's condition (particularly for workers who are at risk of self-harm or with significant psychological issues) is carefully weighed against the usefulness of surveillance and the availability of other

means of investigation in the circumstances.

In situations where there are questions regarding a worker's clinical presentation, the requestor involves the appropriate clinical advisor (Psychology Advisor and/or Medical Advisor) to discuss whether surveillance is likely to provide information that is relevant to the clinical opinion being sought, such as whether video evidence would change the current understanding of the worker's level of disability. For example, surveillance will likely provide evidence relative to a person's ability to lift and carry or a person's avoidant reaction to a specific stimulus or event. However, surveillance is unlikely to provide evidence regarding a worker's loss of sensation due to an injury to a sensory nerve or evidence of internal psychological states. As well, the requestor discusses with the clinical advisor the potential impact of surveillance on the worker.

(B) *Risk of Harm to the Worker*

Before making a request for surveillance, the requestor considers the impact of surveillance on the worker. Individuals may suffer emotional distress related to their injuries, which could be exacerbated by surveillance. A person requesting surveillance should first carefully weigh the need for the information against the possibility of harming the worker. The likely value of the information to be obtained by surveillance and the anticipated consequences to the individual and his/her relationship with WorkSafeBC is considered. As well, a review of factors such as the type of psychological condition, risk of self-harm, and stress level of the worker will assist in determining whether a request for surveillance is appropriate in the particular situation. Where a worker has a significant psychological condition (e.g., suspected psychosis) and there is risk of self-harm, surveillance is not carried out.

If the worker is at risk of self harm, is psychologically fragile, or has an identified mental illness, the requestor refers the claim to a Medical Advisor and/or Psychology Advisor for advice on the potential psychological impact on the worker of conducting surveillance. If the worker is currently receiving treatment for the psychological condition or mental illness, the Medical Advisor and/or Psychology Advisor consults with the worker's treating physician and/or specialist to assess the impact that conducting surveillance might have on the worker's mental health. After the consultation, and if it is determined that surveillance is appropriate, the requestor identifies to Field Investigations on the surveillance request form that the "worker may be at risk of self harm or is psychologically fragile".

If surveillance is undertaken, the requestor consults with the Medical Advisor and/or Psychology Advisor on the surveillance results and how to deliver the surveillance results to the worker. Prior to giving advice to the WorkSafeBC officer, the Medical Advisor and/or Psychology Advisor will ask the worker's treating physician or specialist for an opinion on the possible impact on the worker of WorkSafeBC relying on, or communicating to the worker, the surveillance results. If a team meeting is held with the worker to discuss the

surveillance results, the Medical Advisor and/or Psychology Advisor attend(s) the meeting.

(C) Procedure for Requesting Surveillance

To initiate a request for surveillance, the “Surveillance Request” form on WSN is filled out. The request is sent to the requestor’s manager for approval, and upon approval, is forwarded to the Field Investigations Department for a further review and approval.

The surveillance request must state the grounds for making the request and articulate clear objectives.

Upon receipt of the request for surveillance, the Field Investigator, Field Investigations Department determines whether surveillance is warranted and appropriate. If surveillance is not approved, the Field Investigator discusses the reasons directly with the requestor.

Prior to deciding on a request for surveillance, the Field Investigator works with the requestor to obtain positive identification of the intended person to be placed under surveillance.

(D) Treatment of Surveillance Results

When the surveillance is completed, the Field Investigator arranges a meeting with the requestor to discuss the findings and determine any other action that may be required. The requestor determines whether the evidence should be placed on the claim file. Where there is some question about the relevance of the evidence and whether it should be placed on the claim file, the requestor discusses these concerns with the Field Investigator. Any concerns or questions about the relevance of the evidence are referred to the requestor’s supervisor for decision. Following the discussion, the Field Investigator develops a report.

All surveillance evidence is placed on the claim file except if the evidence meets the criteria set out below. The outcome of the investigation is not a determining factor. The evidence may support, disprove or be inconclusive with respect to the issue being investigated. However, the surveillance results become adjudicative evidence and form part of the claim file.

Surveillance evidence should not be placed on the claim file in the following circumstances:

1. Where surveillance is undertaken but is inaccurate or the accuracy is unknown (e.g., was not conducted on the intended person or cannot verify that the surveillance is on the intended person) and as a result, the evidence is not relevant to the adjudication of the claim,

2. Where the evidence is both:
 - a. not relevant to the adjudication of the claim and
 - b. contains sensitive personal information.

For example, video surveillance is taken of the worker sitting down in a public place. The video does not show whether the worker can move around or whether there is any indication of pain. The worker is in the company of a much younger woman (who may or may not be related to him). As the surveillance involves an unidentified person, it may lead to speculation about the nature of the relationship of the worker with the unidentified person, which is irrelevant to the claim and may be of a sensitive nature.

3. Where the worker is at risk of self-harm or otherwise psychologically fragile and the requestor determines, based on input from a Medical Advisor and/or Psychology Advisor and the worker's physician and/or specialist, that the surveillance evidence may have an adverse effect on the worker's mental health if placed on the claim file.

In these situations, the surveillance evidence is destroyed. Where surveillance is initiated as a result of unsolicited information received by WorkSafeBC, the principles in Policy item #99.23, *Unsolicited Information* in the RSCM apply to the surveillance results.

Once it is determined that the surveillance evidence should be placed on the claim file, the Field Investigator places or arranges for the placement of the surveillance evidence on the claim file. This includes the Field Investigator's report and any additional evidence such as video evidence and the private investigator's report. The Field Investigator reviews the private investigator's report and materials and removes inaccurate and irrelevant information prior to forwarding this evidence to the requestor.

Where surveillance has been conducted and is to be placed on the claim file, the file documentation indicates the reasons it was requested. The evidence/concerns leading up to the surveillance are documented on the file.

All physical evidence is sent to the Central Filing Department for secured storage.

(E) Use of Surveillance Evidence in Making Decisions on a Claim

WorkSafeBC officers should exercise caution when determining the weight to give information revealed in recordings, recognizing that:

- video recordings make a dramatic impact on the viewer;

- surveillance is authorized only when conducted from a public vantage point and in circumstances where the person being investigated is not in a place where he or she would have a reasonable expectation of privacy;
- recordings may be selective, such as when there are breaks in the footage over a specific time period (i.e., information relevant to the issue in dispute, such as when a worker rests or experiences pain, may not be recorded). In these situations, the worker's own description about his/her ability to perform the activities in question, throughout the entire time period, is considered.

The activity observed under surveillance should be directly relevant to the conditions, restrictions and limitations under question and documented on the file. The activity should be clearly shown and not assumed. The injured part of the worker's body should be clearly visible on the video and whether the worker has difficulty performing a particular activity related to the injured area should be clearly demonstrated.

The duration and frequency of the activity should be considered and documented on file. The interpretation of the relevance of the observed activity to the investigative outcome should be considered and documented by a WorkSafeBC officer, after seeking the opinion of a qualified individual (e.g., a kinesiologist, a WorkSafeBC Medical Advisor or Psychology Advisor). Comments of a worker's movement are based on observable facts and not thoughts or opinion (e.g., the worker was walking *with a smooth pace and no visible limp* vs. the worker was walking in a *normal* manner).

Any demonstrated possible dysfunction or symptomology in the video recording (e.g., limping, rubbing/holding one's back, neck or limb) is considered and commented on by the qualified individual who reviews the video for the purpose of providing an opinion on file. Assumptions about the effort, force or exertion that is required by a particular motion are to be avoided. For example, a worker may be observed carrying a large bag. However, that does not necessarily mean that the object is heavy.

Evidence from video recordings is considered in conjunction with all other evidence. Where the surveillance evidence suggests that the worker is no longer disabled or is overstating his or her disability, and whose presentation is contrary to medical/psychological evidence on file, the WorkSafeBC officer establishes a plausible explanation of the discrepancy.

Surveillance evidence showing fraud or misrepresentation does not in itself disentitle the worker to past or future benefits. The surveillance evidence is considered along with any other evidence and a decision made on the merits as to whether the worker had or has a disability, and if the disability appears less than what was previously recognized what the level of disability is or was.

The weight given to the surveillance evidence is documented on the file by the WorkSafeBC officer who is using the surveillance evidence to make a decision on the claim. The officer states what action was taken as a result of the surveillance (i.e., is the evidence sufficient to warrant termination of benefits, or does it merely indicate that further investigation is necessary in order to determine the worker's entitlement to benefits?).

Prior to making a decision that relies in whole, or in part, on surveillance evidence, the WorkSafeBC officer discusses the matter with their Manager. The Manager reviews the surveillance evidence, together with other relevant evidence on the claim file, and provides guidance on whether or not the surveillance evidence can be relied on to make the proposed decision.

If the Manager agrees with the officer's weighing of the evidence, the claim decision is made and communicated as outlined in section (F) below. If the Manager does not agree with the proposed outcome, decisions made on the claim will be consistent with the Manager's weighing of the evidence.

(F) *Communicating Surveillance Results to the Worker*

If surveillance is undertaken and the resulting surveillance evidence is to be placed on the claim file (i.e., does not meet the criteria set out in section D regarding when surveillance evidence should not be placed on the claim file), the requestor informs the worker of:

- the fact that surveillance was undertaken and has now concluded/ceased (e.g., WorkSafeBC is not conducting on-going surveillance of the worker)
- the reason why surveillance was undertaken
- the results of the surveillance
- any decision taken as a result of the surveillance.

The worker is given an opportunity to view and respond to the surveillance evidence prior to finalizing any decision adverse to the worker based on that evidence. The WorkSafeBC officer considers any statements made by the worker in relation to all prior evidence obtained concerning the worker's abilities. Where evidence of any type is used which contradicts the worker's statements, the officer makes a clear statement regarding the worker's credibility in that particular matter.

As is the case with all decision letters, the worker is to be informed of his/her rights of review.

(G) Non-Print Evidence from External Sources

Sometimes WorkSafeBC receives non-print evidence such as photos, videotapes, audio tapes, or clothing from people outside of WorkSafeBC such as workers, employers, and their representatives.

Where the evidence has been requested by WorkSafeBC, the officer determines whether the evidence should be placed on the claim file, taking into account the accuracy, relevancy and sensitivity of the evidence (see *Section D Treatment of Surveillance Results*).

Where the evidence is unsolicited, the officer applies the principles outlined in Policy item #99.23, *Unsolicited Information*, in the RSCM to determine whether the evidence should be placed on the claim file.

If the officer determines that the information should be placed on the claim file, the "Evidence Record" form is filled out and accompanies the evidence when it is sent to Central Filing Department for secured storage.

If the officer determines that the evidence should not be placed on the claim file, the evidence is returned to the sender, if known. Otherwise, the evidence is destroyed.

CROSS REFERENCES:

See also *Appendix A - Performance Standards for PI Firms and Private Investigators in Protocol for Use of Surveillance in Investigations by the Workers Compensation Board of BC*, October 14, 2004, and *Practice Directive C12-8, Managing Claims of Psychologically Vulnerable Workers*.

HISTORY:

This Practice Directive was amended March 29, 2010 to identify circumstances when a Medical Advisor and/or Psychology Advisor consults with a worker's treating physician and/or specialist and to add in item D(3). This Practice Directive was amended on March 16, 2011 to clarify the requirement for the Medical Advisor and/or Psychology Advisor to consult with the worker's treating clinician when a worker has an identified mental illness. The Practice Directive was further amended on March 24, 2016 to require Manager review prior to a decision being made that relies on surveillance evidence.

APPLICATION:

This Practice Directive updates and clarifies current practice.